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**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1947**

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**No. 60**

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**JOSEPH WHITE MUSSER, GUY H. MUSSER,  
CHARLES FREDERICK ZITTING, ET AL.,**  
*Appellants,*

*vs.*

**THE STATE OF UTAH**

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**APPEAL FROM THE SUPREME COURT OF THE STATE OF UTAH**

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**BRIEF OF APPELLANTS**

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APPEAL FROM THE SUPREME COURT OF THE STATE OF UTAH

## BRIEF OF APPELLANTS

*To the Honorables, The Chief Justice of the United States  
and the Associate Justices of the Supreme Court of the  
United States:*

A.

### RESUME OF FACTS

1.

On April 21, 1944, thirty-two defendants were charged in the District Court of Salt Lake County, Utah (a State Court) with conspiracy to violate public morals. If we delete from the information all of the overt acts that were eliminated by either that court or the supreme court of

the State of Utah for lack of proof, the information reads as follows: (T. 1, 7, 48, 49, 60)

"That the said above named defendants at the time and place aforesaid, did wilfully and unlawfully; agree, combine, conspire, confederate and engage to, with and among themselves and to and with divers other persons to your affiant unknown; to advocate, promote, encourage, urge, teach, counsel, advise \* \* \* polygamous or plural marriage and to advocate, promote, encourage, urge, counsel and advise \* \* \* the cohabiting of one male person with more than one woman and in furtherance and pursuance of said conspiracy and to effect the object thereof, did commit the following overt acts:

3. That said defendants on the first day of July, 1942, purchased a house located at 2157 Lincoln Street in Salt Lake City, Utah.

9. That the said defendants at Salt Lake County, State of Utah, in 1942 and 1943, attempted to convert Helen Smith to believe in and to live in polygamy."

2a

The case came on for trial in October, 1944, but such was the publicity that it was necessary to examine 200 talesmen to get a jury, and even some jurors, finally accepted by the court over the objection of defendants, had such fixed opinions that they stated it would require evidence to change their pre-determined conclusion (T. 10-17). (This denial of constitutional rights will be discussed later.)

2b.

One of the original defendants, Heber Smith, being ab-

3  
sent in the army, the case against him was not dismissed but deferred; nevertheless his former wife, Helen Smith, was permitted to testify concerning what he privately had said to her to convert her; and that denial of due process—the testimony of a wife against her husband—is likewise herein later discussed. (T. 28).

2c.d.

Testimony showed that the defendants purchased a church building wherein they held religious meetings and taught all of the original tenets of the Mormon Church, including the revelation contained in the Doctrine and Covenants (Sec. 132) concerning a plurality of wives as essential to exaltation in the celestial kingdom of God (T. 18-28). *There was no evidence of either the performance or practice of plural marriage*; and such alleged overt acts were taken from the jury. (T. 8)

2e.

The defendants were all convicted and sentenced to a term of one year each, notwithstanding they had constantly pleaded their rights under the Federal Constitution (T. 41-42).

3.

On appeal to the Supreme Court of Utah, that court eliminated all but 18 of the defendants; adjudged that there had been no denial of due process in the selection of the jury or in the wife against husband testimony; and made an astonishing ruling as follows:

"We therefore hold that an agreement to advocate, teach, counsel, advise and urge other persons to prac-

...tice polygamy and unlawful cohabitation, is an agreement to commit acts injurious to public morals within the scope of the conspiracy statute." (T. 52).

4.

Certiorari was granted by the Supreme Court of the United States on April 28, 1947. (T. 88).

B.

### POINTS INVOLVED

Three major points are herein involved, all of them having been properly brought to the attention of the lower courts by the defendants, claiming rights under the Amendments to the Constitution of the United States:

1. It is a denial of Constitutional rights for a court to compel a defendant to accept a juror who states that he has such a fixed opinion on the merits of the case that it will require evidence to overcome it.
2. It is a denial of Constitutional rights for a court to permit a wife to testify against her husband in a proceeding in which the action against him and others is as to him only deferred, not dismissed.
3. It is not a crime to advocate the practice of plural marriage as a religious doctrine essential to the highest salvation; and it is not a crime to hold religious services wherein such an expression of religious faith is given.

Since in this case the defendants are not charged with the practice of plural marriage, it involves solely their right to give speech concerning it. In other words, may a citizen of the United States advocate the practice of plural

marriage now as a religious tenet essential to eternal salvation?

C.

## ARGUMENT

1.

### THE JURY SELECTION

This case came to trial against thirty-two defendants; and before a jury was finally selected, 200 talesmen were called. The defendants exhausted *all* of their peremptory challenges; nevertheless the court refused to discharge jurymen who had formed or expressed such opinions against them that it would require evidence to change such preconceived verdict. Perhaps in few cases in the history of American jurisprudence were more talesmen examined; yet, withal, the judge deemed it necessary to accept jurymen despite their bias. The defendants were thus convicted *before* they were tried; and, *ipso facto* denied the due process of an impartial trial and the equal protection of the law. The defendants had to (a) overcome preconceived convictions, and (b) then proceed to prove that, beyond a reasonable doubt they were not guilty. (T. 10-17). It was an impossible undertaking from the start; hence the defendants stand before this Court convicted and sentenced to one year's imprisonment for talking; and talking alone.

The extraordinary feature of the case is, that it involves not one right but many of the freedoms—religion, press, speech and assemblage. In other words, the defendants in a lawful assemblage of worship spoke and printed that for which they are to be incarcerated. Utah

has three populations: A dominant Mormon people who regard the defendants as heretics; a Gentile minority hating anything Mormon; and—the defendants—, hence the defendants were compelled to accept a jury pre-determined against them. Note this: (T. 12):

“If he can come into this court without hearing any evidence and have an opinion—if it takes evidence to change that mind, he is not eligible. That is the law.”

“The Court: Not in this court, I am sorry to say. The challenge is denied.”

There we have the problem in a nutshell: is a defendant denied due process and impartial trial when the jurymen thrust upon him state that it would take evidence to change their preconceived opinions?

Despite innumerable state cases to the contrary, and decisions from this court, I am not convinced of the logic of holding that the privileges and immunities guaranteed by the 14th Amendment against state infringement refer only to the freedoms of “religion”, “speech”, “press”, “petition” and assembly of the first Amendment, for the matters of “unreasonable searches”, double jeopardy, self incrimination, “just compensation”, “public trial by an impartial jury”, confrontation “with witnesses”, “compulsory process”, “excessive bail”, “excessive fines”, and “cruel and unusual punishment”, which appear in the 4th to 8th Amendments inclusive, seem equally important. Indeed, between the time of the ratification of the first ten Amendments on December 15, 1791 (by Virginia, the 11th state of the then 14) and the time of the approval of the 14th Amendment, on July 9, 1868 (by South Carolina, 28th state of the then 37), the people had

77 years to think the first ten Amendments over and learn to like them. New states were coming in rapidly, the old ones did not want the new ones to come forward with statutes contrary to the rights and immunities of the first eight amendments, which they had learned to cherish.

Fearful of the broad denial of State sovereignty contained in the 14th Amendment, Ohio and New Jersey even withdrew their ratification; but it was too late—Congress, on July 21, 1868, passed a joint resolution declaring the amendment a part of the Constitution. (See Rules U. S. Senate, 1939, p. 417). To this day Kentucky and Maryland have not ratified the 14th Amendment; and Oregon withdrew consent three months after it became law. Thus the states realized that they were curbing themselves greatly, for there is nothing in the 14th Amendment to indicate that it has only the rights of the first Amendment in mind. It intended all of the rights and immunities of the fourth to eighth amendments as well, so far as I can see; and Amendment 6 provided for a "public trial by an impartial jury". All citizens of any State are *ipso facto* citizens of the United States as well, hence they are entitled to the privileges and immunities of the first eight amendments, for to hold otherwise were to deny their citizenship in the United States.

It was natural and correct for the States during the 77 years after the enactment of the first ten Amendments to hold that they applied only to the Federal government; indeed it was not until about the turn of the century that this court began to appreciate the fact that free speech and the like were restrictions on the States.

In other words, the first Amendment was assumed to

be within the jurisdiction of this court as a restraint on the States. What was wrong with the 4th, 5th, 6th and 8th Amendments on such an assumption? Not to be put twice in jeopardy, not to be given a fair trial by an impartial jury, are denials of rights just as important as denial of free speech.

A review of the debate in Congress prior to the adoption of the joint resolution proposing the 14th Amendment convinces one of these conclusions: (a) the Civil War having just closed, much of the debate came under the head of "Reconstruction"; (b) it seems to have been taken for granted that a native born citizen of the United States had all of the privileges and immunities of the first eight amendments to the Constitution of the United States; (c) the main debate was on the right of Indians, Negroes and Chinese to enjoy them; (d) *the fourteenth amendment was a condition upon the re-entry into statehood of those southern states that had imposed cruel and unusual punishments upon such of their residents as had manifested sympathy towards the North*; (e) the 14th Amendment was an injunction against all states who sought, either by statute or legal interpretation, to deny residents within their domain, the immunities and privileges set forth in the first eight amendments; (f) I did not find any passage which would lead one to believe they had in mind the rights and immunities of the first amendment only.

For instance, on May 10, 1866; Mr. Bingham of the House (The Congressional Globe, 1st Sess., 39th Cong., Pt. 3, p. 2542), speaking on privileges and immunities of the proposed 14th Amendment, said:

"Many instances of State injustice and oppression have already occurred in the State legislation of this

Union, of flagrant violations of the guaranteed privileges of citizens of the United States; for which the national government could furnish by law no remedy whatever. Contrary to the express letter of your Constitution, 'cruel and unusual punishments' have been inflicted under State laws within this Union upon citizens, not only for crimes committed but for sacred duty done, for which and against which the Government of the United States had provided no remedy and could provide none. \* \* \* It was an opprobrium to the Republic that for fidelity to the United States they could not by national law be protected against the degrading punishment inflicted on slaves and felons by State law."

Nevertheless, if we rely on the 14th Amendment alone as applicable only to the first, the question arises: was the selection of the jury in this case so obviously unfair as to be a denial of due process and a refusal to give the defendants the equal protection of the laws? Put it this way: If a State grant a jury trial, then that trial must be a fair one, for, if not, it violates not only statutory but also common law and the Fourteenth Amendment. In other words, the machinery of the law must work equally and fairly for all. The question is: not, "were the defendants given a *proper*", but "were the defendants given a *fair* trial?"

If a fair and impartial jury is a cogwheel of that machinery, as it is in Utah, then the 14th Amendment must condemn any trial that lacks that wheel. This court did assume jurisdiction over just such a matter on those very grounds in the Anarchists case (1887) by writ of error to the State of Illinois, 8 S. Ct. 21, 123 U. S. 168, 31 L. ed. 80.

"Due process of law" means well recognized principles, privileges and immunities, with rules so widely honored that they represent not only the common law but also the conception of justice of democratic peoples desirous of affording all the people "the equal protection of the law". Even the Ordinance of 1787, concerning the government of the territory northwest of the river Ohio, passed by the confederate Congress on July 13, 1787, provided (Article II of Sec. 14) that the "inhabitants" "shall always be entitled to the benefits of the writs of *habeas corpus* and of trial by jury \* \* \* and of judicial proceedings according to the course of the common law."

If in a race between two automobiles one has to overcome the prejudice or handicap of some water in its gasoline, even racers would not call the contest a fair trial; if gasoline represent the jury, we are in the same predicament here. *There has not been equality or impartiality in the machinery or process of the law.* The defendants exhausted all of their peremptory challenges—they were compelled to accept prejudice, ay even an employee of their bitterest enemy, the dominant opposing religious sect!

We strongly commend the dissenting opinion of Chief Justice Larson of the Supreme Court of the State of Utah (T. 69) for it clearly demonstrates the astonishing conclusion that a jurymen "with a fixed and determined opinion of defendants' guilt or of his innocence as immovable as Gibraltar", is nevertheless, under the majority opinion impartial!

In this case the prospective juror McDonald (T. 10) had

an opinion; had expressed it to others; had an opinion now "as to the merits of the case"; and the opinion "could be changed; as the case went on it could be changed". The Court accepted him. Mr. Decker (T. 13) had an opinion on the "merits of the case". He said: "It would take evidence to change my opinion. Does that answer it? I have formed an opinion. I couldn't help it." The Court accepted him. The talesman Arnold (T. 15) had not only formed an opinion, but such opinion was based on "information about this case other than the public press and the people talking about it." The Court accepted him.

Such proceedings shock one's conception of an "impartial trial by jury", for the defendants exhausted all of their peremptory challenges.

In this case not only did the trial judge, but the Supreme Court of the State of Utah also disregarded a case that had become sacrosanct in the history of Utah's jurisprudence; a case dating indeed from Volume One of the Utah reports. It is so apropos in its exact similarity that we must quote from it in extenso. It is only fair to state, however, that in the hectic period of defending twenty-seven cases simultaneously, involving either trials or appeals, all growing out of the polygamy persecution of 1944, we failed to call this all important case to the attention of either court. The shortcoming in that respect nevertheless in no way affects its validity as a binding precedent. The all important thing is that we were right in our statement of the basic principles of the law, even if, as counsel, we did not have legal anthologies at the tips of our tongues. The case is: *Conway v. Clinton*, 1 Utah 215, —the pertinent part of the opinion being as follows:

"Mr. James Lowe was also called as a juror and being examined, as to his qualifications, testified as follows:

Plaintiff—Do you know anything about this case?

A. I do; I have heard it spoken of.

Q. From what you have heard, have you formed or expressed an unqualified opinion?

A. I have.

Q. Did you hear what purported to be the facts?

A. No, I have not; I don't know anything about it only what was spoken of on the streets, and read about in the papers.

Q. Then the opinion you formed is an opinion based upon that rumor?

A. Yes, sir.

Q. Do you say that that opinion is an unqualified one?

A. It is qualified by what I have heard.

Q. Have you any bias or prejudice for or against either of the parties?

A. No, sir.

Q. Is there anything to prevent you from rendering an impartial verdict?

A. No, sir.

Q. Have you any business relations with either of the parties?

A. I guess not, I don't know of any.

Q. You reside in town?

A. Yes, sir.

Q. Did you in August, 1872?

A. Yes, sir.

Q. You think you could render an impartial verdict?

A. I could from the testimony.

Q. What did I understand you to say in reply, in regard to an unqualified opinion?

A. At the time when I heard of the case I formed an opinion; it was only based on the rumors.

Passed by plaintiff.

Defendants—I understood you, Mr. Lowe, that at the time you heard the rumors you had formed an opinion?

A. Yes, sir.

Q. And at that time it was an unqualified opinion?

A. Yes, sir.

Q. Then it would take evidence to remove that opinion?

A. Yes; it would take evidence to remove it.

Q. How far did you live from the place where it happened?

A. I lived in the Seventh Ward at the time.

Q. I understand you formed the unqualified opinion from the reports?

A. Yes, sir.

Q. You did not talk with any person that knew anything about it?

A. No, sir.

Q. Would not these reports bias your mind still, unless it was removed by testimony?

A. It would.

“Upon this examination the defendant challenged for cause under the sixth subdivision of the 163d section of the code, which gives a challenge where the juror has formed or expressed an unqualified opinion or belief as to the merits of the action. The challenge was denied and the juror sworn in the cause.

We can see no reason for disallowing this challenge. The juror says emphatically that he has formed an unqualified opinion, and though in one answer he says he thinks he could render an impartial verdict, yet in the conclusion of this examination he repeats that he had formed an unqualified opinion, and that it would bias his mind unless removed by testimony. To a juror whose mind is thus freighted with definite opinions of the merits of a case, the law justly interposes the right of a challenge. The law intends, and it is the parties' right, to have jurors who are impartial; and whose minds are not embarrassed with unqualified, preconceived opinions of the case. Nor is it material upon what his opinions are founded, whether upon rumor or fact. It is the unbiased state of mind that is requisite, so as to enable the juror with candor and impartiality to decide upon the rights of litigants submitted to his consideration.

"It is suggested that the defendants did not make use of their peremptory challenges, and as they might have challenged these jurors peremptorily and did not, the objection should be regarded as waived, and the error as not prejudicial. If the doctrine thus stated were to be regarded as correct, of which we are not satisfied, still it would not work a cure of the error; for it appears that the Defendants exercised two peremptory challenges and could not therefore have had but one left, while two incompetent jurors were sworn. But it should be further observed that while it appears that the defendants used two peremptory challenges, it does not affirmatively appear that they did not use more, nor that all their challenges were not exhausted. When error appears upon the record, to avoid its effects resort cannot be had to presumption, but can only be removed by matter affirmatively shown by the record. We think the challenges were erroneously denied."

Thus in the present case the defendants were denied the *fair process* of the law as well as the equal protection thereof, not only by Utah precedent but also by the due process clause of the 14th Amendment. Under that Amendment *the Supreme Court of the United States is the guardian of fairness and impartiality in legal procedure.* In their desperation the defendants exhausted *all* of the peremptory challenges *allowed by the Court*—everyone seemed pre-determined against them; and the trial became a mockery of justice.

Since the foregoing was written for the printer, three extraordinary decisions have come to my desk, all of them reported in the advance sheets of the Supreme Court Reporter, dated July 15th, 1947. They are:

Fay v. People of N. Y., 67 S. Ct. 1613;  
 Adamson v. People of California, 67 S. Ct. 1672; and  
 Foster v. People of the State of Ill., 67 S. Ct. 1716..

I get much comfort from the Fay case where, in rendering the opinion of the Court, Mr. Justice Jackson wrote:

"Society also has a right to a fair trial. *The defendant's right is a neutral jury*". (Italics inserted.)

Mr. Justice Reed, in the Adamson case, admitted that the due process clause of the 14th Amendment protects a "fair trial".

I believe that is exactly the point for which we are herein contending, although the Court apparently derives the word "neutral" from the word "due" in the due process phrase of the 14th Amendment; whereas I would derive it from not only that, but also the words "impartial jury" in the 6th Amendment.

I must admit that the Adamson case, affirming the right of counsel to comment on a defendant's refusal to take the witness stand in his own behalf, and the Foster case affirming a denial of counsel, are against what I have heretofore argued herein, namely, that all eight first amendments were carried into the fourteenth; nevertheless I am still convinced that I am right. The American people will be shocked to discover that their cherished Bill of Rights is not what they thought. The very exhaustive and epochal dissenting opinions make my mild efforts herein very weak indeed; but I have decided to allow my observations to stand as they are, especially as I did considerable research into Congressional debates and may have at least a fly speck of additional evidence there. One thing strikes me forcibly: How can due process be differentiated from fair process? For after all that is what I am contending for here. For many years this Court has been selecting rights of the first eight amendments as included within the fourteenth; hence it seems to me high time to assert at last that "unreasonable searches", double jeopardy, self-incrimination, "public trial by an impartial jury", confrontation with witnesses, "excessive bail", "excessive fines", "cruel and unusual punishments" are matters as vitally included in the 14th Amendment as the freedom of religion, press, assembly and petition. To hold otherwise is to rewrite the school books of the Nation.

It seems to me that this lofty Court should recognize, that ever since 1889, when in *Chicago v. Minnesota*, 134 U. S. 418, 10 S. Ct. 462, 33 L. Ed. 870, the due process clause was discovered, this Court has been secreting, one by one, the rights and immunities of the first eight amendments as within the purview of the fourteenth. I cannot

express it so brilliantly as did Mr. Justice Black and Mr. Justice Douglas in their dissenting opinion in the Adamson case *supra* (67 S. Ct. 1690 et seq.); but apparently this Court held, in the following order, that the 14th Amendment included rights of the first eight Amendments:

1. Due process, 1889, *Chicago v. Minn.* (*supra*).
2. Contracts, 1896, *Allgeyer v. La.*, 165 U. S. 578, 17 S. Ct. 427, 41 L. Ed. 832. *Twining v. N. J.*, 1908, 211 U.S. 99, 29 S. Ct. 19, 53 L. Ed., 97, comes in in here as a confirmation of the right of the states to abridge the rights of the first eight Amendments, but left to this Court to decide what is "due process".
3. Right to counsel, *Powell v. Alabama*, 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158 (now apparently invalidated by *Foster v. Ill.*, 67 S. Ct. 1716).
4. Cruel and Unusual Punishment and Double Jeopardy: *State v. La.*, 329 U. S. 459, 67 S. Ct. 374.
5. Informed of the Charge Against Him: *Snyder v. Mass.* 291 U. S. 97, 54 S. Ct. 330, 78 L. Ed. 674, 90 ALR 575.
6. Just Compensation: *Chicago v. Chicago*, 166 U. S. 226, 17 S. Ct. 581, 41 L. Ed. 976.
7. Freedoms of Religion, Press, Speech, Assembly, Petition: *Everson v. Board of Ed.* 67 S. Ct. 504; *Bridges v. Cal.* 314 U.S. 252; 62 S. Ct. 190, 86 L. Ed. 192; 159 ALR 1346.

In view of the learned opinions in the *Fay*, *Adamson* and *Foster* cases (*cit. supra*), as typified by Mr. Justice Frankfurter's point in the *Adamson* case, to the effect that, when the Fourteenth Amendment was adopted, the constitutions of nearly half of the states "did not have

the rigorous requirements of the Fifth Amendment for instituting criminal proceedings through a grand jury", I am constrained either to back down or elucidate. My conclusion is: the Fourteenth Amendment had in mind those rights which were "implicit in the concept of ordered liberty" as distinguished from mere procedural rights. Let us call them (A) Basic rights and (B) Procedural rights. Following such an analysis we have as:

## A.

## BASIC RIGHTS

- I. Freedom of Religion  
Freedom of Speech  
Freedom of Press  
Freedom of Assembly  
Freedom of Petition
- II. Right to Bear Arms
- III. Right Against Soldiers' Occupying One's Home
- IV. Right Against Unreasonable Searches and Seizures
- V. Right Against Double Jeopardy  
Right Against Self Incrimination  
Right to Due Process of Law  
Right to Just Compensation
- VI. Right to Public Trial by an Impartial Jury  
Right to Confrontation by Witnesses  
Right to Information on the Accusation  
Right to Compulsory Process for Defense  
Right to Assistance of Counsel
- VIII. Right Against Excessive Bail  
Right Against Excessive Fines  
Right Against Cruel and Unusual Punishments.

## B.

## PROCEDURAL RIGHTS

## V. Indictment by a Grand Jury

## VII. Jury Trial in Suits of \$20.00 or More:

If this discrimination between basic and procedural rights be adopted as the concept of the Fourteenth Amendment it will solve many of the differences in philosophy now before the Court. Procedure refers to method; the basic rights refer to fairness and fundamental justice.

I feel that in the Adamson case Mr. Justice Frankfurter has unduly emphasized the procedural rights above—grand jury and \$20 jury trial. They were but the tail of the faithful watchdog known as the Bill of Rights, and without that tail Bill is the devoted Airedale we home folks expect him to be.

Furthermore, as I read Mr. Justice Black's quotations from Senator Howard and Mr. Bingham (67 S. Ct. 1703, 1707), wherein the Senator detailed all eight of the first amendments except those set forth above as procedural, and Mr. Bingham read all eight, I am convinced that the foregoing analysis is correct.

I blame the Congress of 1866 for not enumerating what is meant by "privileges and immunities"; but the members doubtless took it for granted that everyone knew of the much cherished rights of the first eight amendments. In all of the debates there appears to have been little misunderstanding on what the privileges and immunities were—the grave question was whether the States desired to be bound to uphold them.

Nevertheless, in this case, the majority, as well as the minority of this Court, must admit that the due process

clause of the 14th Amendment includes a fair trial. There can be no "fair trial" with a pre-opinionated jury, and such is the conclusion of the Fay case.

## 2.

## A WOMAN TESTIFYING AGAINST HER HUSBAND

Sec. 104-49-3 of the Utah Code 1943 reads:

"There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate. Therefore, a person cannot be examined as a witness in the following cases:

(1) A husband cannot be examined for or against his wife without her consent, nor a wife for or against her husband without his consent; nor can either during the marriage or afterwards be, without the consent of the other, examined as to *any* communication made by one to the other, during the marriage; but this exception does not apply to civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other, nor for the crime of deserting or neglecting to support a wife or child, nor where it is otherwise specially provided by law."

It was held in *Bassett v. United States*, 137 U. S. 496, 34 L. Ed. 762, 11 S. Ct. 165, that polygamy was not a "crime committed by one against the other" within the meaning of this section.

It will be noted that the statute reads "during the marriage or afterwards be, without the consent of the other". In the case at bar the husband never gave his consent; he was absent and his attorney objected strenuously in his

behalf. The action against him was merely severed, deferred; and to this day it has not been tried. The Court reluctantly allowed the wife to testify, thus not only violating Utah's Constitution, Art. I, Sec. 12, but also the statute itself.

The common law rule is stated by Jones' Commentaries on Evidence, 5:4046 (2nd Ed.); as follows:

"At common law the rule prevails that all private conversations or communications between husband and wife are to be regarded as confidential and privileged and cannot be divulged by either when on the witness stand, either during the existence of the marriage relation or after its termination by death or divorce."

The Utah statute is very broad; it reads "any" communication, not just "confidential" ones; so a wife may not be examined concerning *any* statement her husband might have made to the repetition of which he objects. This applies even if he be dead, in which case the objection is presumed. Obviously there can be no criminal prosecution against a dead person; so her competency to testify is much stronger if he be living and his attorney objects. The Utah statute requires an active consent, not merely an absence of objection.

Thus the defendant herein was denied due process under the 14th Amendment of the United States Constitution; for he has not yet been tried; and the other defendants were convicted on a private conversation between this very man and his wife of which conversation they knew nothing.

— The Bassett case (*cit. supra*) took it for granted that under the same Utah statute as exists now a wife could not testify against her husband. The only question was whether polygamy was a crime against her. The Court held it was a crime against "the marital relation" not her, and she could not testify.

We have read with much interest the old case of *Twinning v. New Jersey* (1908), 211 U. S. 78, wherein self-incrimination was held a matter for the states to decide, and not a privilege or immunity under the 14th Amendment. In the light of the modern conception of the law, we regard that decision as entirely erroneous; and that the 14th Amendment was meant to include all of the relevant provisions of the first eight Amendments. We see nothing in reason to say that the arrow of the 14th Amendment pointed only toward the first; for it indicated and insisted upon the due process or machinery of the law. The defendants were convicted by a denial of that process. It may be admitted that there is nothing in the first eight amendments concerning evidence *per se*; that is, this Court is not called upon in a State appeal to review the evidence as if it were a court of equity and constrained to determine the balance thereof; but it does have within its lofty power the right to determine whether anyone has been denied the regular machinery of the law. It is not a question of what Mrs. Smith said, but did she have a right under due process to say it?

Since the foregoing was written, the Adamson decision (*cit. supra*) has been rendered. With sincerity, deep respect and cordiality I expostulate on it, not only as counsel but also as a citizen aiming to preserve our constitutional heritage, for it emasculates the Bill of Rights and

if we do not stop that Bill will be but a skeleton in a land of supposed virile freedom. It is, both a shock and a disillusionment to the Nation. No one admires the erudition of this Court more than I, no one more concedes the exalted purity of its motives, but I think the majority forgets that when the 14th Amendment was passed there had been 77 years of decisions holding that the first eight amendments did not apply to the states. That amounted to a tremendous carry-over of legal precedents that influenced early contemporary jurists mightily who shied from any rights the 14th Amendment did not specifically detail. "Privileges and immunities" was a vague phrase that they did not care to analyze. History has the habit of understanding great movements better than did contemporaries. The South was practicing violations of the basic conception of American rights, including those against "impartial" juries and self-incrimination; so the Union States decided once and for all to make those rights not only a condition of re-entry into the United States by the Southern States, but also a binding force on states new or old. What were they talking about when they spoke of "privileges and immunities" of citizens of the United States if not the rights of the first eight amendments? The fiction that differentiates between a citizen of the United States and a citizen of a State does not appeal to me. The 14th Amendment refers to "all persons born or naturalized in the United States" no matter where they reside in this country. Citizenship in a State is a local matter; but, whether a man have citizenship in a State or not for the purpose of voting, he still has the protection of the fundamental Bill of Rights.

Even as I write this, let me say, with a humility somewhat aroused by disillusionment, I have before me the very volume that is given aliens by the Immigration Department to assist them in comprehending the United States government and in passing citizenship tests. It is called: "Our Constitution and Government: Federal Textbook on Citizenship" by Catheryn Seckler-Hudson (U. S. Dept. of Labor, Immigration and Naturalization Service, Government Printing Office, Washington, D. C., 1940, 400 pp.) I submit that its entire contents would lead any alien to believe, that the first eight amendments of the Constitution of the United States are restraints on the States as well as the national government. I will pass over its glorification of freedoms of speech, press, religion, petition and assembly, and give just one quotation, which does not even suggest a difference between State and Federal Courts (p. 333):

"If a person is accused of having committed a crime, our courts are required to regard him as innocent until he has been proved guilty. This prevents a person from being convicted without convincing proof of guilt. During a criminal trial the accused person need not testify unless he wishes to do so. Even if the person is found guilty, the court cannot order a cruel or unusual punishment or an unreasonably large fine. If a person has been arrested and tried for a crime and found not guilty, he cannot legally be tried a second time for the same offense."

In spite of all this, the due process clause of the 14th Amendment protects us here; for one of the most cherished concepts of the common law was that a wife could not testify against her husband. If "due process" upholds fair trial it must deny such procedure.

## FREEDOM OF SPEECH, PRESS, RELIGION AND ASSEMBLY

It cannot be too strongly noted, that the information herein contains not even a suggestion of a public emergency as a result of the preaching of the defendants; the attempt by her husband to convert one married woman was obviously of no public moment; so we are confronted with the bare problem—is it unlawful to advocate the present practice of plural marriage as a religious belief when no public emergency is even remotely suggested from such teaching?

Pillars of strength in our republic are the four freedom-cornerstones—press, speech, worship, assembly—for they were constructed, not by legislative enactment, not by judicial interpretation, but by the founding people themselves who virtually placed on each cornerstone the historic sign "*noli me tangere!*" This prosecution is an assault upon those rights, for it punishes the defendants not for *practicing* their religion, but for *expressing their views* concerning it.

This Court must be loath to creep into the position of arbiter of free speech and worship; for only the most extraordinary public emergencies should force it into that invidious role. It has sworn to uphold the Constitution, not weaken or destroy it.

There is a vast difference between words appealing to one's discretion and those resulting in direct and immediate injury without allowing discretion time to cogitate. To shout "FIRE!" in a theatre when there is no fire, as has been said, is a potent, immediate, direct wrong, often

more disastrous than silent physical force.

Persuasion, on the other hand, appeals to reason, discretion, free agency and the endowed sense of right and wrong. This sense of right or wrong is innate even in the lesser Primate, such as the apes, monkeys, marmosets and lemurs, to say nothing of the highest mammal—man.

People constantly approve or condemn radio talks, political addresses and sermons; and are so accustomed to the radical that they pay little more attention to the soap-box declaimer in our parks than to the chatter of monkeys a few rods away. Persuasion that results in riots and other public immediate emergencies is very rare, but if it do not, the feeling is "let him talk." It is the constitutional heritage of free speech that prompts the remark, for one does not have to listen.

It is the function of the courts to punish deeds, not words; and there are adequate laws applicable to deeds. Let people harangue and declaim, stump, spout, lecture and rant; let them discourse and sermonize—but punish only what they do.

When the late Franklin D. Roosevelt wrote the four freedoms of the Atlantic Charter, he placed first "freedom of speech and expression—throughout the world"; second, "freedom of every person to worship God in his own way—throughout the world". Yet this case sentences eighteen citizens to a year in jail for *expressing* their religious belief and advocating its present practice!

If the prosecution rely on the case of *Davis v. Beason* (Idaho, 1890), 10 S. Ct. 299, 133 U. S. 333, wherein the

court asserted that the teaching of polygamy is "aiding and abetting", we maintain that in the present case there was no crime to aid and abet. The charge that the defendants "did perform plural marriage" (T. 2) or practice it, was taken by the Court from the jury (T. 7) for lack of "any competent evidence in support" of it. Hence there was no crime to aid or abet; for the building of a church house and an unsuccessful attempt by her husband to convert a woman to a tenet of religious belief cannot be considered crimes in any language. The Court in the Davis case did not disassociate talk from acts; and therein reposes the error of its *obiter dictum*.

That the decision in the Davis case—that mere membership in an organization is criminal if the practice of one of its tenets is unlawful—is erroneous is apparent from the judgment in *Herndon v. Lowry* (Ga. 1937), 57 S. Ct. 732, 301 U.S. 242, 81 L. Ed. 1066, wherein the defendant was accused of soliciting members in the Communist party, whose object was to overthrow the government.

This Court, speaking through Mr. Justice Roberts, said:

"The power of a state to abridge freedom of speech and of assembly is the exception rather than the rule and the penalizing even of utterances of a defined character must find its justification in a reasonable apprehension of danger to organized government.  
\* \* \*

"If, therefore, a state statute penalize innocent participation in a meeting held with an innocent purpose merely because the meeting was held under the auspices of an organization membership in which, or the advocacy of whose principles, is also denounced as

criminal, the law, so construed and applied, goes beyond the power to restrict abuses of freedom of speech and arbitrarily denies that freedom. \* \* \*

"In its application the offense made criminal is that of soliciting members for a political party and conducting meetings of a local unit of that party when one of the doctrines of the party, established by reference to a document not shown to have been exhibited to anyone by the accused, may be said to be ultimate resort to violence at some indefinite future time against organized government. It is to be borne in mind that the Legislature of Georgia has not made membership in the Communist party unlawful by reason of its supposed dangerous tendency even in the remote future. \* \* \* The appellant induced others to become members of the Communist party. Did he thus incite to insurrection by reason of the fact that they agreed to abide by the tenets of the party, some of them lawful, others, as may be assumed, unlawful? \* \* \* In these circumstances, to make membership in the party and solicitation of members for that party a criminal offense, punishable by death \* \* \* is an unwarranted invasion of the right of freedom of speech."

In *Gitlow v. People* (1925), 45 S. Ct. 625, 268 U. S. 652, wherein a man was accused of advocating the overthrow of organized government, Justices Holmes and Brandeis gave their now famous words of dissent as follows:

"The question in every case is whether the words used are in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that (the State) has a right to prevent."

In conformity with the foregoing, we have the decision

of this Court in *Cantwell v. Connecticut* (1940), 60 S. Ct. 900, 310 U. S. 296, wherein Jehovah's witnesses solicited money for a religious cause without a certificate and attacked the Catholic Church. The Court, through Mr. Justice Roberts, said:

"Freedom of conscience and freedom to adhere to such religious organization or forms of worship as the individual may choose cannot be restricted by law. On the other hand it safeguards the free exercise of the chosen form of religion. Thus the Amendment embraces two concepts—freedom to believe and freedom to act. The first is absolute, but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society. \* \* \* In the realm of religious faith \* \* \* sharp differences arise \* \* \* the tenets of one man may seem the rankest error to his neighbor.

"The essential characteristic of these liberties is, that under their shield many types of life, character, opinion, and belief develop unmolested and unobstructed." \* \* \* "In the absence of a statute narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State, the petitioner's communication, considered in the light of the constitutional guarantees, raised no such clear and present menace to public peace and order as to render him liable to conviction."

This case is extraordinary in that it involves the four freedoms: of speech, press, worship and assembly, for they are, all included in the true expression of one's religious faith. Dare one henceforth quote the Mormon "Bible" (The Doctrine and Covenants) which commands plural marriage (Sec. 132) and say he believes *that* princi-

ple should be practiced today? Is that book to be censored, the sacred book of a million people? A book sold throughout the world? Or shall we say: *"talk as much as you like so long as you do not act?"* What mattereth it if a man shout from the housetops all kinds of esoteric eruditions and castigated advocacies? Does one have to believe or follow him? This great republic never has, and we hope, never will be afraid of free speech. Did people commit murder because Col. Silas Titus recommended it as the proper disposal of Cromwell, or because Thomas DeQuincey wrote of it as one of the fine arts? We must admit that in these United States even erudites are not of one mind on either ethics, sociology or religion; hence for this Court to exalt itself into the position of a mentor and decider were to attribute to itself divine discretion. The members naturally eschew such an exalted position.

If one advocates the practice of that which is unlawful he is in peril only to the extent that, if his words be taken seriously and immediately by people who commit acts amounting to a public emergency, he is liable with them for their deed; otherwise, much as his words may be objectionable, he may rely upon the immunity of the Fourteenth Amendment. This is as far as this Court can well go, and be true to its oath to uphold the Constitution. The prosecution herein should bear in mind that it is in these cases seeking to curtail free speech.

One way to destroy this republic were for this Court to become the censor of people's words. It has sufficient labor in the interpretation of law without becoming the official critic of speech, and especially religious speech concerning which multitudes disagree.

In *Bridges v. California* (1941) 62 S. Ct. 190; 314 U. S. 252; 86 L. Ed. 192, the defendant was fined for contempt for making certain comments on pending litigation. This Court (Justice Black rendering the opinion) said:

"This Court said that there must be a determination of whether or not the words used are used in such circumstances and are of such nature as to create a clear and present danger that they will bring about the substantive evils. Moreover, the likelihood, however great, that a substantive evil will result cannot justify a restriction upon freedom of speech or press. The evil itself must be substantial \* \* \*; it must be serious \* \* \* and even the expression of 'legislative preference or beliefs' cannot transform minor matters of public inconvenience or annoyance into substantive evils of sufficient weight to warrant the curtailment of liberty of expression. \* \* \* What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished. Those cases do not purport to mark the further-most constitutional boundaries of protected expression, nor do we here. They do no more than recognize a minimum compulsion of the Bill of Rights. For the First Amendment does not speak equivocally. It prohibits *any law* 'abridging the freedom of speech or of the press.' It must be taken as a command of the broadest scope that explicit language, read in the context, of a liberty loving society, will allow."

Saying is not doing; talking is not acting. Let the modern Hermes, Desmothenes, or Cicero, ay even Lady Sneerwell, declaim or chatter, what mattereth it—the listeners are sufficiently punishable for their deeds.

The grave danger in a curb of free speech lies in the selection of a criterion. Cicero was acclaimed by the masses as an eloquent patriot, yet the wife of Mark Antony had him killed and his head nailed up by his tongue, under which she placed the sign, "Wag no more!" Who is to determine the matter when the members of one church often think the beliefs of other churches to be silly and baneful? Many intelligent men doubt immortality; others assert not only its existence but also its regulations and plans. Sermonizers far and wide therefore should be allowed to prate and prattle, jabber and jaw. Some like Marcus Antonius will be so eloquent as to cause their enemies to weep until an unbelieving Annias shears their curly locks away. Others will declaim by the wayside. Beset by "isms" on every side, Americans are accustomed to freedom of expression; they listen and use their own judgment. Who are we to deny them that Constitutional right? Who are we to judge their words? After all this Court consists of nine human beings with mundane frailties; and the Court is under the perpetual injunction to leave freedom of speech, press, worship and assembly alone.

The defendants advocated only the present practice of that religious doctrine, which their progenitors had taught as a sacred principle for a hundred years; and such teaching by written word had for that long a time been approved by the silence of the United States government.

If the Federal government for a hundred years has cared not to suppress the Doctrine and Covenants of the Mormon Church, which not only advocates but actually enjoins polygamy, there is little merit at this late date

in the contention that such teaching is contrary to public morals. (See the Symes decision T. 81). Like a *verbatim* and *literatum* translation of the Bible, many passages must be taken *cum grano salis*; but every religion to the intellectual man is to be taken *cum exceptione*, as Cicero said. We are today in an age of pity—the intellectual man tolerates the supernatural nonsense of the non-intellectual; yet we must endure one another.

Thomas Browne was right when he wrote, "The religion of one seems madness to another"; so, also, L. W. Reese:

"Creeds grow so thick along the way  
Their boughs hide God."

Let Emerson have a word—"The religions we call false were once true—"; for it exactly describes the situation here; the Bible tells us that men beloved of God—David, Abijah, Rehoboam and Solomon—had respectively "many", "fourteen", "eighteen" and "seven hundred" wives; and all of the Mormon "prophets, seers and revelators" from Joseph Smith to the recently deceased Heber J. Grant, each had several to many wives to whom they paid the highest respect.

The defendants are diehards in that they believe, that a divine principle should not be subject to change by the exigency of man-made laws; and even watchers from the sidelines cannot forget that Blackstone wrote, "No human laws should be suffered to contradict" the law of revelation (1 Bl. Com. 42). Indeed, as pointed out by Clark ("Biblical Law", Sec. 55) "In the first American colonial grant in 1584 authority was conferred to enact statutes for the government of the proposed colony provided that 'they

be not against the true Christian faith'." (See *Holy Trinity v. U. S.* (1892), 143 U. S. 457 (grant by Queen Elizabeth to Sir Walter Raleigh) "and it may be argued", Clark continues; "that no law making body has ever been invested with power to enact statutes in violation with Biblical law". The same author goes on to say (Sec. 196, Sec. 197): "The patriarchal family was polygamous" . . . "The Bible seems to take polygamy for granted."

The defendants concede that it is unlawful to practice plural marriage, but they feel hurt and wronged when sentenced to a year's imprisonment for merely bearing their testimony concerning the truthfulness of the Bible and the Doctrine and Covenants upholding the principle. To them eternal salvation is as important as life; but they allow every man the right of free agency. (T. 34, 38).

Religions are a melee; Catholics, Huguenots, Episcopalians, Puritans, Congregationalists, Unitarians, Presbyterians, Lutherans, Calvinists, Methodists, Wesleyans, Baptists, Anabaptists, Ubiquitarians, Independents, Irvingites, Sandemanians, Glassites, Erastians, Antinomians, Davidists, Familists, Bible Christians, Bryanites, Dunkers, Ebionites, Arians, Eusebians, Jovinianists, Quakers, Shakers, Quietists, Stundists, Judaists, Boehmenists, Swedenborgians, Trinitarians, Homoeousians, Homoeiousians, Adventists, Second Adventists, Mormons and Christian Scientists—each thinks he has the only way to immortality and fellowship with God. No wonder we have agnostics who say: "Prove all things." An intellectual man, faithful to his reasoning power, can only observe the scrimmage. Nevertheless we live in a country that affords each and every one of them free speech, freedom of worship and assembly. Who are we to say that, in our legal training requiring proof, this

one is wrong, that one right? No—let them all have their say, whether it be in favor of plurality of wives, theotherapy, absolution or venomous snake worship.

Once in a while we come upon articles advocating the destruction of deformed infants or even the painless murder of all people over 65 years of age. Such adumbrations amount to nothing.

So far as we know this is the first case in the history of United States in which a sentence of imprisonment was given anyone for *expressing* his religious views; and the strangest feature about it is that the prosecution took place in a state the people of which for sixty years themselves suffered the direst religious persecution of American history. Europe has had its wars caused by sect fighting sect; yet here in our own very midst, under our own Constitution is a persecution reminiscent of the Dark Ages. *Credite posteri*, said Horace; and we wonder whether even our posterity will believe that such a thing occurred.

Polygamy is not *malum in se* but merely *malum prohibitum*; and when one sees the outstanding children resulting from its early Utah practice one is half inclined to say *bonus prohibitum*, for to anthropologists, and hygienists there is little doubt that it fulfills the first commandment of God in a very convincing manner. If health be the criterion, even we empiricists must admit its salutary results.

We may be cynics imbued with the spirit of Socrates and Heetley, but we must acknowledge that an astonishing number of polygamous children now shine in the highest offices of the land, whether in military, judiciary, po-

litical or business activities. Whether we be latitudinarian or devout; heterodox or orthodox, we must admit these things; and we marvel at it. To call, therefore, an expression of belief in the present practice of polygamy contrary to public morals were to deny the irrefutable findings of eugenics; and to term such an expression a public wrong were to repudiate our Constitutional freedoms. We are not herein advocating the practice of a plurality of wives, but merely admitting that so to advocate is not against public morals. Let the people decide whether they care to practice a principle so blessed by biology and eugenics; let the people listen and jail not them who so believe.

If there be a God and if the Bible be His written word, who are we to condemn that which He blessed, who are we to set up our ideas of the present and the hereafter?

Verily it is: the true religions of yesterday are the false ones today; the false religions of yesterday are the true ones now. Only they, endowed with supernatural wisdom, dare discriminate legally, in this vast land of freedom of press, speech, worship and assembly.

What right has this Court to decree that a revelation from God to Joseph Smith, the Mormon prophet, was spurious? Can this Court decide what religions are true?

The conspiracy herein alleged is merely one to worship God in accordance with the dictates of the consciences of the worshipers, and those consciences, based on both ancient and modern revelation. Revelation may seem to many of us utterly absurd, but even we doubters must accord the other man the privilege to believe; and, if he

believes, he must in our government have the paramount right to express himself and advocate his incredulous belief. To assert that Jesus was divine may shock our reason, but are we the ultimate religious credence, are we to apotheosize ourselves? Common sense tells us that each of us must judge supernatural religion in accordance with our respective experiences. The experience of these defendants is for the sanctity of the practice of their belief. Misguided they may be; but only the solemnity of the grave holds the eternal answer.

My brilliant colleague, Edwin Hatch, once called to my attention that the Lord's prayer contains these words:

*"Our Father which art in heaven hallowed be Thy name. Thy kingdom come, Thy will be done in earth as it is in heaven. \* \* \*"*

Men have a right to believe in the law of the divine as paramount in the path of exaltation. To deny the verbal expression of their belief were to forbid them to swear allegiance to their God. Practice of their belief is a matter not involved in this case.

Can the entire Christian world, venerating the Lord's prayer as the guide of its conduct and believing sincerely in the coming and establishment of the Lord's kingdom on earth, and, further, believing that they as Christians by reason of being Christians will so become or have actually become the children of Abraham (who in holiness engaged in plural marriage) and that they will become subjects as the children of Abraham in the Lord's kingdom—can they, the entire Christian world, so believe, with any degree of sincerity, and at the same time both disbelieve

and deny the right in others to discuss freely and advocate the doctrines and beliefs of Abraham? Herein the sincerity of the entire Christian world stands on trial.

But—religion is a very subtle influence. Granted; but so is the radio and the cinema. Do they unconsciously glorify crime? They at least indicate that for a time the criminal enjoys a rather charmed and luxurious existence. We hesitate, therefore, to predict what would be before us were we to start now to censor free speech that does not result in an immediate calamity of wide public distress. We say this because we are enjoined by the Constitution itself from curtailing free speech, and this Court must indulge in the gravest assumptions of authority to supersede that injunction. This Court did not make the Constitution—its function is to protect and interpret it.

By subtle inference many cheap and notorious novels of transient popular acclaim persuade towards promiscuity; but American girls do not go to the devil because such authors roseate the path. We are a people blessed with discretion and commonsense and endowed by our Creator with the power to discern good from evil. This Court cannot set itself up as a mentor for American civilization, decreeing that the people may say this and may not say that. What the people say and advocate in their religions is their business, not ours, unless they cause upheavals that threaten the government itself or emergencies of grave immediate public concern. Are we to decide that Byron's "Don Juan" must not be printed, or Boccaccio's "Decameron?" Courts are intended to punish actions, not talk. This Court is not endowed with the heavenly gift of infinite wisdom, and, therefore, it must inevitably

regret the day when it starts on the long path of deciding just what people may or may not say.

As Judge Symes said (U. S. v. Barlow, 56 F. Supp.; 165 S. Ct. 25):

"The natural reaction to reading a publication setting forth that polygamy is essential to salvation is one of repugnance, and does not tend to increase sexual desire or impure thoughts."

Nothing this Court has previously written, nothing it does now write should be interpreted to mean that it sets itself up as the arbiter of what people may say in their ordinary affairs either of worship or use of the press; it may act only to deter those extraordinary speeches that incite to riot, subversion of the government itself, or produce public emergencies of the most immediate and pressing character.

In *Chaplinsky v. New Hampshire* (1942), 62 S. Ct. 766, 315 U. S. 568, 86 L. Ed. 1031, wherein one of Jehovah's witnesses called a City Marshal offensive names, this Court, speaking through Mr. Justice Murphy, said:

"There are certain well defined and narrowly limited classes of speech, the prevention and punishment of which, has never been thought to raise any constitutional problems. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their utterance inflict injury or tend to incite an immediate breach of the peace."

There is nothing of that kind here—nothing that by common law was *ipso facto* wrong.

A match has a useful function; misused it may cause a

conflagration; and so it is with religious free speech; for in moderation it is salutary; but in immoderation it may be a conflagration of evil. Only when it produces a conflagration of evil may this Court say "desist". The conflagration in this case is not even a candle light—the attempted persuasion of one woman! Since the days of Adam men have attempted to revenge the enticement of Eve by trying to persuade woman into the path of wrong; indeed the fundamental design of the male is comprehended by every adolescent female. If the blandishments of man were all punished the species *Homo sapiens* would not only be wise but mute. When these allurements are charmed with the promise of eternal salvation, coupled with the ignominy of public scorn they are scarcely inducements after all; for who cares to flaunt the law *flagrante delicto*? An unmarried woman without a legal husband but with children always faces such a denouement. How then may we say that the advocacy of polygamy, even religious polygamy conduces her immorality? It is a weak case against the cajolery of a ruthless but transient lover.

It was the intent of the 14th Amendment to prevent encroachment by the States upon those fundamental rights of citizenship provided by the Constitution itself. It is the duty of this Court to guard against infringements of those rights. One's personal views of religion are of no consequence in this broad forum of freedom of expression; what is ridiculous, baneful to one is sacred to another. The Constitution does not give this Court the right to prefer one religion over another, even if it were so inclined.

It occurs to us that there is adequate redress against actions without culpating free speech. The State of Utah

may sufficiently punish unlawful cohabitation, or polygamy, without encroachment upon the free expression of religious belief or opinion. There is, therefore, no public emergency justifying the interposition of this Court against freedom of religious expression or thought.

The opinion of the lower Court does not attempt to base itself upon any public emergency; it makes the bald statement that it is unlawful to advocate or preach the practice of plural marriage. That is going too far, directed as it is towards free speech. If the opinion or the facts showed a grave public emergency, the decision of this Court might be otherwise; but none such is shown. The facts of practice have been punished; we may not superimpose a punishment upon the act of expression alone.

You and I meet at a Thanksgiving dinner. One of you at the dinner says: I believe polygamy should be practiced now—it is the will of the Lord, and I think that from a biological as well as religious and sociological standpoint it should be practiced now. I agree with you and think we should constantly bear our testimony to that effect. You, one of you, so declare yourself next day to Mary Gray. You are arrested, tried, found guilty and sentenced to one year's imprisonment for your talk. That is this case in a nutshell.

No immediate public emergency; no result whatsoever except the attempt on the part of one of you to convert Mary Gray! Yet for one lonely year you are to sit behind bars to think the matter over. If we have reached that point in free speech, then the halcyon isles of the equatorial Pacific look good. Let us go to Bala and forget.

the nation that taught us freedom of press, religion and speech: Let us say, we are afraid of free speech, sanctified though it be.

Suppose it be argued, Utah has a statute against libel and slander, hence it may enact a statute against the advocacy of polygamy, and that, irrespective of any immediate public emergency, this case is in effect the enforcement of such a statute. That reasoning is false on several grounds: (1) Utah has no statute against the advocacy of polygamy; (2) libel and slander are common law crimes, because their words of themselves do immediate and often irreparable harm to some one; and (3) religious words that expound doctrine are informative and not harmful *per se*.

Again, suppose it were argued that this Court should change the word "immediate" to "eventual", and condemn those words that have a tendency to create an eventual public emergency. That obviously would be going too far; yet, since in this case there is no evidence of any immediate public danger, it is the very theory on which the prosecution apparently relies.

Suppose the prosecution were to insist that the words *spoken were an incitement* to crime; but here again we are confronted by etymology. The word incite comes from the Latin "in" plus "citare", meaning to set in rapid motion, rouse, stimulate. It means to stir up, animate, instigate, immediate action; and is not a word generically related to exposition and religious persuasion. Thus France, one of the most liberal nations of the world in the matter of free speech, condemns incitement to crime, but permits unlimited exposition of religious principles. Its

laws (1881, 1882, 1889, 1895, 1908, 1919) may, indeed have been the forerunners of this Court's present policy, that spoken words must be conducive of *immediate* public emergency and crime to be culpable. Over there they punish slander, libel, defamation and sometimes the publication of false news; but, by the law of 1905, they recognize no form of religion as a state matter and allow all religionists to have their say. I feel personally that France leads the world in its welcome of philosophical discussion; and it has many great philosophers to its credit.

Incitement does not wait for contemplation, pondering and the exercise of considered free agency; it wants results right now—indeed incitement pertains to the tumultuous crowd, to the rabble-rouser in action. Certainly it has no relation to a calm church assembly where in humility the principles of the Bible are taught with resignation and prayer.

On the other hand, to advocate a thing is to plead or raise one's voice in favor of it, to defend or recommend it publicly; to advocate is to appeal to the intellect, not to passing emotions wherein incitement has its play.

This Court therefore may well condemn words of emotional incitement that lead to immediate public emergency or crime, but certainly not words that merely persuade one to a system of religious thought.

The information filed in this case (T. 1) charged the defendants with a conspiracy to "advocate" and "practice" polygamy; but the judge said there was no evidence of "practice". (T. 48, 49, 60) and took that from the jury; so they were found guilty only of "advocacy" or "advo-

eating" against which there was no law. They were found guilty of free speech without evidence that such speech harmed anyone. All of the lower courts, as well as the prosecution, have failed to appreciate, that if the alleged conspiracy did not result in something unlawful it was no conspiracy at all; nevertheless the Supreme Court of Utah bases its decision on the bare conclusion that it is unlawful:

"To advocate, teach, counsel, advise, and urge other persons to practice polygamy" (T. 52)

with or without any resulting public emergency, with or without any result at all. The decision goes beyond anything heretofore dared or written against free speech. It is a condemnation of abstract free speech, that is, speech separated or withdrawn from material embodiment, from material examples, practice, or particular consequences. To speak is not to do; to advocate is not to practice; to believe is not necessarily to follow; and from time immemorial this has been true especially of religious conviction. People may say their say, outside of defamation, slander and libel, until such time as they act, when adequate laws will take care of them.

If, with reference to religion, we leave out atheism, the skepticism and cynicism of Xenophanes, Socrates and Voltaire, and the agnosticism of Huxley, as not satisfying the human yearn, we are still confronted by the necessity of *unquestioning faith*, if we are to have any supernatural religion at all. It is true that this faith is sometimes buttressed by teleological arguments pointing out the design in nature; design indicates a thinker; a thinker of such magnitude and power must be God. Nevertheless, from the legal standpoint, requiring proof, materialistic mech-

anism without God, is an equally acceptable explanation of the phenomenon of life. All historic religions therefore—Christianity, Hinduism, Judaism and Mohammedanism—are dependent on faith alone. This faith being unable to prove or demonstrate itself is in a Court of law an entirely inconsequential thing; except in this—it is protected by the Constitution. At this very moment no one is able to *prove* that plurality of wives is or is not essential to the highest exaltation in the kingdom of Heaven, if indeed there be such a kingdom; therefore advocates of an affirmative belief must be left alone.

For many years the writer was a member of the Society for Psychical Research of London, England, in which Lord Kelvin, Sir Oliver Lodge, and other British scientists were active participants. We investigated every presented claim—ghosts, premonitions, telepathy, telekinesis, dreams—and discovered that only premonition of death is an established phenomenon, and even this is explained as an intense telepathic communication to a synchronized recipient at the instant of physical destruction. In other words, the effort to prove supernatural phenomena by scientific methods has failed; we are therefore constrained to rely on faith and faith alone, unless we join Xenophanes of Colophon and say that all life has a natural not supernatural origin or destiny.

I have stood beneath the great lamp in the Cathedral of Pisa, from the swinging of which Galileo discovered the isochronism of the pendulum; and have lain on the identical stone at the top of the leaning tower of Pisa from which he dropped objects to prove the first principles of dynamics. Yet because of his free speech concerning his discoveries he was driven away as a heretic and forced by the

Inquisition of Rome on threat of death to denounce his theory that the earth revolved around the sun!

Verily free speech is a sacred thing! Niccolous Copernicus, before Galileo, dared to write on "The Revolutions of the Heavenly Bodies" and feared to publish it for 36 years. When he did so, he was condemned to death as a heretic.

Bruno asserted a plurality of worlds, and they burned him at the stake in Rome.

Servetus maintained that the Holy Ghost pervades all nature, for which free speech Calvin had him roasted over a slow fire at Geneva; indeed, between 1481 and 1808, over 300,000 persons were punished for holding dissenting religious views, 30,000 of them being burned at the stake. You who read your Mosheim and your Draper will know that these assertions are true.

To deny free speech now were to revert to the dark ages; for thank God we have not yet a State religion, a State ukase on what we think and say.

Nothing manifests more exquisite cruelty than creed fighting creed; sect punishing sect; and when the legal authorities use their strong arms on one side or the other, we raise the curtain to welcome the dark ages.

Can this court assert that a plurality of wives is not essential to exaltation in the celestial kingdom of God, for to do so were to apotheosize itself. What does this Court, exalted as it is, know about the hereafter? Absolutely nothing. Neither you nor I know whether Joseph Smith was a Prophet of God. Nor Jesus a Son of God.

If, therefore, we can prove no supernatural religion

whatever it be, we certainly cannot select one as contrary to supernatural probabilities.

By holding that these people are entitled to express their religious belief and advocate its present practice, this Court is not affirming polygamy but rather stating that if you so believe you may not yet practice your belief; but under the Constitution you may say your say.

The suggestion that one enter polygamy is of immediate repugnance, not only from the standpoint of aesthetics but also sociology and economy; but, biologically and Biblically considered, it is a matter of much worth. Certainly it is not detestable as was the smell of roses to Queen Ann.

A reading of the transcript convinces one of the humility, veneration and sincerity of the defendants. The story is (T. 62) that the husband of Helen Smith prevailed upon her to attend one of the meetings of the group. She did so with her husband; and at the trial she, on cross examination (T. 30-38), admitted that the stenographic report of the entire sermon she heard at that time was a true account. That sermon by Joseph W. Musser (T. 30-38) reads now more like the Sermon on The Mount than something objectionable to free speech. Yet these people are sentenced to one year in jail for speaking those words! It represents the very gist of the case—the attempt to convert Helen Smith. She went there of her own accord (T. 62) and learned that we are all blessed with free agency, even when it comes to obeying the commandments of the Lord as revealed through a modern Prophet. Furthermore the cross examination of the witness Cosgrove (T. 18-28) is a resume of the various Christian

doctrines these people taught. Both of these women were prosecution witnesses; and in their testimony the Court gets a complete story of what these people did. Indeed the persecution of these people reminds one of the tiny underground churches in the Catacombs along the Via Appia at Rome, of people who were either burned as street torches or thrown to the lions of the Colliseum if they insisted that they believed.

The story of the Smith woman—of conversations she had with her *then* husband—was inadmissible from the very beginning; nevertheless that story seemed to control the opinions below notwithstanding, that even to consider the talks between husband and wife was error. It is a very weak cricket—stridulation attempted to be enlarged into a magnivox of immediate general public emergency. It is as if the prosecution adopted the saying of the fly on the Roman chariot wheel: "My, what a dust I make!"

When we come to discuss what speech is *contra bonos mores*, we have a heavy undertaking.

In *Thomas v. Collins* (Texas, 1945), 65 S. Ct. 315, 323 U. S. 516, 89 L. Ed. 430, wherein the defendant solicited labor union members but had no labor organizer card, this Court, speaking through Mr. Justice Rutledge, said:

"The case confronts us again with the duty our system places on this Court to say where the individual's freedom and the State's power begins. Choice on that border, now as always delicate, is, perhaps more so where the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment . . . That

priority gives these liberties a sanctity and a sanction not permitting dubious intrusions \* \* \*. For these reasons any attempt to restrict those liberties must be justified by clear and present danger. The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice.

"These rights rest on firmer foundations. Accordingly, whatever occasion would restrain orderly discussion and persuasion, at appropriate time and place, must have clear support in public danger, actual or impending. *Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation.* It is therefore in our tradition to allow the widest room for discussion, the narrowest range for its restriction, particularly when this right is exercised in conjunction with peaceable assembly.

"But in our system where the line can constitutionally be placed presents a question this Court cannot escape \* \* \*. And the answer under that tradition can be affirmative to support an intrusion upon that domain *only if grave and impending public danger requires this* \* \* \*. The statements forbidden were not in themselves unlawful, had no tendency to incite to unlawful action, involved no element of clear and present, grave and immediate danger to the public welfare. Moreover the State has shown no justification for placing restrictions on the use of the word 'solicit'. We have here nothing comparable to the case where use of the word 'fire' in a crowded theatre creates a clear and present danger.

"\* \* \* History has not been without periods when the search for knowledge alone was banned. Of this we may assume the men who wrote the Bill of Rights

were aware. But the protection they sought was not solely for persons in intellectual pursuits. It extends to more than abstract discussion unrelated to action. The First Amendment is a charter for government.

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"It is from petty tyrannies that large ones take root and grow. This fact can be no more plain than when they are imposed on the most basic rights of all. Seedlings planted in that soil grow great, and, growing, break down the foundations of liberty."

Mr. Justice Jackson, concurring, said:

"But it cannot be the duty because it is not the right of the state to protect the public against false doctrine. The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulation of the press, speech and religion. In this field everyone must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us \* \* \*. or would I. Very many are the interests which the State may protect against the practice of an occupation, very few are those it may assume to protect against the practice of propagandizing by speech or press. These are thereby left great range of freedom.

"This liberty was not protected because the forefathers expected its use would always be agreeable to those in authority or that its exercise always would be wise, temperate, or useful to society. As I read their intentions, this liberty was protected because they knew of no other way by which free men could conduct representative democracy."

It is most respectfully submitted, therefore, that the conviction in this case violates provisions of the Constitu-

tion of the United States that are binding on the respective States, and hence should be reversed.

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